In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1389

ADOLPH WEINBERG AND ETTA WEINBERG, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are husband and wife who engaged in extensive farming operations in the Imperial Valley of California. Until 1955, they conducted these operations through a partnership. In 1955, they established twelve separate corporations to which they planned to transfer their unharvested crops. The necessary papers for incorporation were filed with the Secretary of State of California and all of the stock in the corporations was issued to petitioners at the end of 1955 or in early 1956. Agents whom the partnership had previously designated harvested the crops in 1955 and 1956 in the ordinary course. The buyers of the crops, at petitioners' instructions, drew drafts payable to the

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cash and farm crops" (Pet. App. 22), the central legal issue, as stated in the petition in the Tax Court, was whether "the income reported by each of the corporations was properly reportable by the Adolph and Etta Weinberg Partnership or by the petitioners" (Pet. App. 16).[1] At the outset of the trial, counsel for the Commissioner stated (Pet. App. 17):

> Respondent expects the evidence in this case to show that neither harvested nor unharvested crops were transferred to these corporations but rather the proceeds from the sale of these crops were given to the corporations as capital.

The Tax Court thus construed the pre-trial stipulation as reflecting only the nominal consideration for the stock (Pet. App. 23), a construction more consistent with the actual facts than is the construction unsuccessfully urged by petitioners in the courts below.

Alternatively, the Tax Court simply dismissed the stipulation as being erroneous and refused to be bound by it, a proper practice, see *Carnegie Steel Co.* v.

[1] The reference to "the matured crops which were transferred to the fourteen corporations," which appears in the supporting statement to the Commissioner's notice of deficiency (Pet. App. 46), cannot operate to shift to the Commissioner the burden of proving the correctness of the determination, as petitioners contend (Pet. 26). The Commissioner is not confined to the theory stated in his notice; he may sustain the determination upon different facts and the burden of proving the incorrectness of the determination remains with the taxpayer. *Standard Oil Co.* v. *Commissioner*, 43 B.T.A. 973, affirmed, 129 F. 2d 363 (C.A. 7), certiorari denied, 317 U.S. 688; *Estate of Scharf*, 38 T.C. 15 (1962), affirmed, 316 F. 2d 625 (C.A. 7); see also 9 Mertens, *Law of Federal Income Taxation*, Sec. 50.63 (1968).

Cambria Iron Co., 185 U.S. 403, 444, long established in the Tax Court itself.[3] Petitioners had notice of the Commissioner's position by the outset of trial. Any surprise warranted, at most, a continuance, which petitioners did not seek.

3. The decision in this case also may be sustained on the alternative ground stated by the Tax Court, but not reached by the court of appeals: if the crops were transferred to petitioners' corporations, the transfers effected an assignment of income from the sales of the crops which should be attributed to petitioners. Because "[p]ractically all of the services contributing to the production of the income were performed by petitioner or those representing the partnership" (Pet. App. 24)[4], the transfers accomplished nothing more that the kind of diversion of the right to receive cash that this Court has held should not be accorded tax significance. Compare *Harrison* v. *Schaffner*, 312 U.S. 579; *Helvering* v. *Horst*, 311 U.S. 112; *Helvering* v. *Eubank*, 311 U.S. 122.

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[3] See Rules of Practice, Tax Court of the United States (Rev. 1958, 1965 ed.), Rule 31(b); *Seatree* v. *Commissioner*, 25 B.T.A. 396; *Bingham Trust* v. *Commissioner*, 2 T.C. 853; *Gunderson Bros. Engineering Corp.* v. *Commissioner*, 42 T.C. 419.

[4] This finding—with which petitioners never deal—makes irrelevant the authorities discussed at pp. 28–35 of the petition.

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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[5] If the court denies taxpayers' petition, the Commissioner's protective petition in *Commissioner* v. *Sugar Daddy, Inc.*, No. 1364, this Term, should also be denied. If the present petition is granted, however, the protective petition in No. 1364 should also be granted for the reasons stated therein.

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